87

No. 07-883

FILED
MAR 10 2008
CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

RONALD D. SKELTON,

Petitioner,

v.

SARA LEE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

DEBORAH S. BRENNEMAN
Counsel of Record
LETITIA S. BRYANT
THOMPSON HINE LLP
312 Walnut Street, Suite 1400
Cincinnati, Ohio 45202-4089
(513) 352-6540
debbie.brenneman@thompsonhine.com
letitia.bryant@thompsonhine.com

Counsel for Respondent

214578

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Respondent, Sara Lee Corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
CORPORATION DISCLOSURE STATEMENT .	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Introduction	1
B. Procedural History	1
C. Statement of Facts	2
1. Sara Lee's Operations	2
2. The Transportation Department and the Load Planner Position	2
3. Sara Lee Centralized Its Overall Operations in 2000	3
4. Centralization of the Load Planning Function Fails	4
5. The Decision-Making Process	6
6. Skelton Was Selected for Legitimate, Non-Discriminatory Reasons	11

Contents

Page

7. Skelton Misrepresents the Timeline and After-Effects of the RIF 14

REASONS FOR DENYING THE PETITION .. 16

A. Skelton's Conclusion That the Sixth Circuit's Decision Below Implicates the Seventh Amendment is Based on a Misinterpretation of the Standard Set Forth in *Reeves* and a Mischaracterization of the Sixth Circuit's Decision. 16

1. *Reeves* does not provide that a jury question is necessarily created whenever a plaintiff establishes a *prima facie* case and comes forth with any evidence of pretext. A plaintiff's pretext evidence must be sufficient to discredit the employer's explanations for its action. 17

2. The Sixth Circuit determined that Skelton's pretext evidence was insufficient, consistent with this Court's holding in *Reeves*. 18

B. There Is No Split Among the Circuits Regarding the Probative Value of Evidence of an Employer's Flawed or Subjective Process for Conducting a RIF. 20

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Page

Cases

Bauer v. Bailer, 647 F.2d 1037 (10th Cir. 1981) . 22

Blair v. Henry Filters, Inc., 505 F.3d 517 (6th Cir. 2007) 24

Chapman v. AI Transport, 229 F.3d 1012 (11th Cir. 2000) 23

Coleman v. The Quaker Oats Co., 232 F.3d 1271 (9th Cir. 2000) 22, 23

Cowan v. Glenbrook Security Servs., Inc. 123 F.3d 438 (7th Cir. 1997) 21

Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672 (7th Cir. 1997) 21

Millbrook v. IBP, Inc., 280 F.3d 1169 (7th Cir. 2002) 21

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) 16, 17, 18, 20, 24

Skelton v. Sara Lee Corp., No. 06-4234, 2007 U.S. App. LEXIS 23521 (6th Cir. Oct. 3, 2007) .. 16, 23, 24

Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981) 22

Cited Authorities

Page

Wexler v. White's Fine Furniture, Inc., 317 F.3d 564 (6th Cir. 2003) 19

Rules

U.S. Supreme Court Rule 29(6) i

STATEMENT OF THE CASE

A. Introduction

Petitioner Ronald D. Skelton ("Skelton") was one of nine "load planners" who lost their jobs in a reduction in force ("RIF") which took place at Respondent Sara Lee Corporation's ("Sara Lee") Spring Grove facility beginning in 2002. Skelton was forty-six at the time of his termination. Skelton filed this action based upon a belief that his age was a factor in Sara Lee's decision to terminate his employment. However, and consistent with the opinions of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") and the United States District Court for the Southern District of Ohio ("District Court") granting judgment in favor of Sara Lee, the undisputed evidence compels a contrary conclusion – that age played absolutely no factor in Skelton's termination.

B. Procedural History

Skelton filed this action against Sara Lee on April 16, 2003. His Complaint asserted three claims against Sara Lee: (i) age discrimination in violation of the federal Age Discrimination in Employment Act ("ADEA"), (ii) age discrimination in violation of Ohio Revised Code Chapter 4112, and (iii) wrongful termination in violation of Ohio public policy based upon age discrimination.

On July 31, 2006, following the completion of discovery and briefing by the parties, the District Court granted summary judgment on all of Skelton's claims. On August 24, 2006, Skelton filed his Notice of Appeal with the Sixth Circuit. In Skelton's appellate brief, he

sought reversal only of the District Court's dismissal of his federal and state age discrimination claims. As such, the Sixth Circuit's review was limited to consideration of these claims, and not Skelton's claim for breach of Ohio public policy. On October 3, 2007, the Sixth Circuit affirmed the District Court's grant of summary judgment in favor of Sara Lee with regard to Skelton's federal and state age discrimination claims.

On December 27, 2007, Skelton filed his Petition for a Writ of Certiorari ("Petition") with this Court.

C. Statement of Facts

1. Sara Lee's Operations

Sara Lee manufactures and markets numerous brand-name food products, such as Hillshire Farms, Sara Lee, Jimmy Dean and Ballpark. Sara Lee's brand names are made at production facilities around the country, and then shipped to one of five regional warehousing and distribution facilities, known as mixing centers. Once a particular product arrives at a mixing center, it is combined with other Sara Lee products according to customer orders and placed into loads for shipment by private carriers to Sara Lee's grocery store customers.

2. The Transportation Department and the Load Planner Position

Sara Lee's Transportation Department is charged with (i) the distribution of products from the various production facilities to the mixing centers; and (ii) the combination of products at the mixing centers onto

truckloads for shipment to customers. The Planner's job is to see that these functions are carried out to meet customer expectations at the lowest possible cost. One of the Planner's principal duties is building loads, i.e. selecting the carrier for each shipment and the most efficient arrangement of orders on the trucks. Planners must also address problems such as carrier delays, miscommunications and rush orders that arise in getting products from the production facilities to the mixing centers, and from the mixing centers to the customers.

3. Sara Lee Centralized Its Overall Operations in 2000

Prior to 2000, Sara Lee's nine primary brands were decentralized, and operated as nine independent companies, each with its own management, production, transportation and sales functions. With respect to transportation, Sara Lee did not have mixing centers prior to 2000. Rather, load planning, like other functions, was decentralized, with each brand having its own Planners located at the various production facilities across the country. These on-site Planners simply planned the distribution of products directly from the production facility to the customers. Beginning in 2000, however, Sara Lee drastically changed the way it did business. As the centerpiece of this change, Sara Lee consolidated into a single corporate headquarters in Blue Ash, Ohio, and the nine separate businesses began operating as one.

With the consolidation of its food business, Sara Lee also centralized its transportation function – and with it, the Planner position – into its Spring Grove facility.

As a result, the Planner positions that existed at Sara Lee's production facilities were eliminated, and several Planners were laid off. While Sara Lee eliminated these positions, it hired new Planners in Spring Grove during the first half of 2002.

Unlike many Planners at the production facilities, Skelton was not laid off in the centralization, because he already worked in Spring Grove as a Planner for Sara Lee's Hillshire Farms and Kahns businesses. Instead, Skelton continued to work as a Planner in the new, centralized transportation department, while additional Planners were hired. Like these newly hired Planners, Skelton began performing an essentially new job: planning the distribution of all of Sara Lee's brands from the five mixing centers to Sara Lee's grocery store customers. Therefore, while Skelton argues in his Petition that he had the most experience among all of his counterparts, that is largely untrue. This was essentially a new job.

4. Centralization of the Load Planning Function Fails

While the overall centralization of Sara Lee's brands into one organization was successful in terms of efficiency, the centralization of the transportation function was fraught with unforeseen problems. The mixing centers – a new concept for Sara Lee – were dynamic and busy facilities, constantly receiving shipments from around the country, combining them into truckloads per customer order and shipping them forth. Sara Lee's products are perishable, further adding to the urgency at the mixing centers.

Sara Lee soon realized that having the Planner operating remotely from Spring Grove made it difficult to manage the myriad of problems that arise on a given day. Instead of having a Planner on-site to deal with problems in person, as was the case before centralization, Planners under the new structure had to deal with them by phone or email. Simply put, the new way proved not as effective in addressing the day-to-day difficulties of getting Sara Lee's products to its customers.

Complications with the new transportation organization quickly became acute, and customers began complaining about the late or missed deliveries and errors that resulted. Sara Lee determined that the best way to address the problem was to station Planners on-site at the mixing centers, rather than have them operate remotely from Spring Grove. This would allow Planners to be more hands-on and directly address problems on-site. However, it also necessitated the elimination of Planner positions in Spring Grove.

Skelton ignores the backdrop at hand: because the centralization of the transportation department was such a disaster, management was under great pressure to restructure the department in a manner that would address the customer service problems emanating from the department. In fact, the department was in a crisis mode, and the jobs of the managers were at stake in making a second reorganization work. The importance of this context cannot be over-emphasized. First, it is undisputed that this crisis mode is what propelled the department to focus on the qualities it did in determining which Planners to retain: willingness to go above and beyond the traditional requirements of the job, work long

hours and do more than the minimum. These were the factors critical in making the department successful after its much criticized failures. Further, with their own jobs on the line, the managers had every incentive to make their decisions based only on those factors, without regard to age or any criteria other than who appeared to be most willing and able to get the job done.

5. The Decision-Making Process

In the fall of 2002, Sara Lee went about the process of eliminating Planner positions in Spring Grove and creating new Planner positions in the five regional mixing centers. The events surrounding the RIF and their order are not at all complicated, despite Skelton's best efforts to make them seem confusing. During the first week of October 2002, Larry Rogers ("Rogers"), Vice President of Transportation, discussed the plan to decentralize the load planning function with Phil Lower ("Lower"), Russ Gibson ("Gibson"), and Joyce Humphrey ("Humphrey"). Lower, a consultant hired to address problems in the department, had worked directly with several of the Planners in the preceding months. Gibson and Humphrey were managers who directly supervised the Planners, including Skelton. Because Humphrey, Gibson, and Lower worked directly with the Planners and had first-hand insight into their performance, Rogers relied on their input.

On October 7, 2002, Rogers and Monica Mehta ("Mehta"), Sara Lee's Human Resources Manager, met with the entire department, including the Planners, to inform them of the decision to decentralize the function. Rogers expressly stated that Sara Lee would retain

those Planners willing to take on as much work and responsibility as necessary to ensure the department's success. Rogers further informed the Planners that they would be required to interview for the positions that would remain in Spring Grove, and that those who were not retained could apply for the positions being created at the mixing centers.

During the next week, Rogers and Humphrey interviewed each of the Planners. After the interviews, Rogers, Humphrey, and Lower met to discuss their initial impressions. By this time, Sara Lee had informed Gibson that his position was being eliminated, and he expressed the desire not to take an active role selecting which Planners to retain. However, Gibson provided input on the Planners to Humphrey, and that input was taken into account in the final analysis.

Lower, Humphrey, and Rogers then met again, this time in Blue Ash, to determine which Planners would be retained. They did a forced ranking with the goal of identifying the Planners willing to devote the greatest amount of time and effort to their jobs, go beyond their regular duties, and work hours in excess of their regular work day. The three ranked all of the Planners against this criteria. Of the 17 considered for retention, Skelton ranked eleventh. The following chart shows the results of the final list that Lower, Humphrey, and Rogers developed:

NAME (In Rank Order)	DATE OF BIRTH	AGE AS OF 10/14/02	RETAINED / DATE OF TERMINATION
Little, Jennifer	09/16/75	27.08	Retained
Hayes, Marketta	11/10/57	44.92	Retained
Jones, Mike	11/10/69	32.92	Retained
Baum, Christen	07/17/59	43.24	Retained
Ross, Wayne	09/20/70	32.07	Retained
Romie, David	09/17/56	36.07	Retained
Kellie, Jody	06/24/69	33.30	Retained
Fitch, Beverly	08/20/57	45.15	Retained
Chernock, Charles	04/04/71	31.52	06/27/03
Mosher, Bobbie	11/15/64	37.90	06/27/03
Skelton, Ron	07/25/56	46.22	02/28/03
Jolly, Velda	11/15/56	45.90	02/28/03
Koster, Phil	10/29/69	32.95	03/28/03
Stolkie, Thomas	09/07/55	47.10	01/30/03
Sharp, Joe	05/21/50	52.39	01/03/02
McGraw, Heather	11/29/77	24.86	01/03/02
Sallah, Kimberly	11/23/73	28.88	01/03/02

The statistics from the above chart are telling. Prior to the RIF, the average age of Planners in Spring Grove was 37.79. After the RIF, the average age of Planners in Spring Grove was 36.84, a difference of less than one year. In his Petition, Skelton identifies Charles Chernock (31) and Roberta Mosher (37) among those retained. While Chernock's and Mosher's inclusion in the analysis is appropriate because they lost their jobs as part of the same reorganization, whether they are included or not is of no consequence. Even if Chernock and Mosher are included in those retained, the average age of retained Planners in Spring Grove would be 36.42 after the RIF – a difference of slightly more than one year from the average age of all Spring Grove Planners before the RIF.

More significantly, when the Planners Sara Lee hired at the regional mixing centers as part of the decentralization are included, the average age of all Planners in Sara Lee's transportation department actually increased by more than two years, to 40.40 after the RIF. The chart below identifies the Planners hired for the mixing center locations:

NAME	MIXING CENTER LOCATION	DATE OF HIRE	DATE OF BIRTH	AGE AT HIRE
Johnson, John	Illinois	12/30/02	09/14/47	55.29
Brown, Ricky	Pennsylvania	01/06/03	11/01/65	37.18
Surmick, Andrew	Pennsylvania	01/06/03	12/26/48	54.03
Loyd, Linda	Arizona	01/20/03	03/17/52	50.83
Herrera, Mario	Texas	07/23/03	05/06/66	37.21
Lessard, Christina	Arizona	10/06/03	06/16/76	27.30
Gerace, Toni	Illinois	02/16/04	02/26/58	45.96
Maylath, Mariane	Georgia	03/22/04	07/02/59	44.71
Mashburn, Kenneth	Texas	05/03/04	01/06/59	45.32
Farmer, Karl	Georgia	06/28/04	10/07/69	34.72

The average age of the 10 Planners hired in the mixing centers was 43.25; six of the 10 were at least 44 years old; and three were over 50 (and older than Skelton). As much as Skelton would like to ignore these statistics, they demonstrate that age could not have been a factor in Sara Lee's decisions.

6. Skelton Was Selected for Legitimate, Non-Discriminatory Reasons

Skelton's inclusion in the RIF is entirely consistent with the characteristics Sara Lee emphasized in determining which Planners to retain, and likewise consistent with his superiors' assessment of his performance and attitude. To be clear, Sara Lee's management never believed that Skelton was a bad Planner, or that he lacked the skills and knowledge to do the job. Rather, Skelton simply was not one of the better Planners in terms of effort and willingness to go beyond the basic requirements of the position; and that is why his job was eliminated. Humphrey testified:

> basically, it was just kind of hashed out, to be honest with you, who would be willing to work the longest hours, because that's what they were looking for . . . Sara Lee was looking for people that were willing to put in as many hours as necessary to meet the needs of the business.

With respect to Skelton's work habits, Humphrey testified: "I don't know that Ron worked the same kind of hours that some of the other people worked in the department. You know, typically – I believe that Ron just put in his – you know, did his eight hour day and went home."

Gibson expands upon Humphrey's testimony: "[Rogers] sat down and told us that the people they were looking to keep are going to be folks that, you know, are willing to take on – go the extra mile, take on as much responsibility as needed to make things work." Gibson makes clear that Skelton did not exhibit the characteristics and work habits that Sara Lee sought to retain, ". . . he [Skelton] didn't do extra, he would not – he never volunteered to go the extra leg up like the others that I had mentioned had."

Gibson concisely characterized Skelton's performance as: "[H]e did his job. But frankly, that's all he did, was his job. A lot of people were showing themselves to take on a lot more responsibility than just their jobs, which was what was needed." Gibson further testified:

> Q. [W]ould you have considered Mr. Skelton a more valuable member of the department than those individuals [who were retained]?
>
> A. No.
>
> Q. Why not?
>
> A. Because at the time . . . the department was expanding and growing faster than we can keep up with and what we needed were people that were going to help in more than just their responsibility . . . and frequently this was not the behavior [Skelton] displayed.

Q. When the decision was made that Mr. Skelton was one of the planners who's position would be eliminated, did you disagree with that decision?

A. No.

Gibson explained:

> I don't recall Ron coming to me and asking for any extra duties. I know Michael did, I know Wayne did. Joe Kellie did. Jennifer was always down there, whether she was asked or not, a lot of times they would just lay stuff on her desk and she would do it. Beverly Fitch, more than anybody, I remember commenting, saying 'I don't have anything to do, find something for me to do.'

Humphrey and Gibson's testimony is undeniable because, if anything, they would have reason to be bitter with – not biased toward – Sara Lee. Gibson learned that he would lose his job in early October 2002 – before any decisions had been made as to the Planners.

In addition to the unchallenged testimony of Humphrey and Gibson, Skelton's last performance appraisal prior to the RIF shows that while he had good technical skills as a Planner, Skelton failed to demonstrate the very characteristics Sara Lee sought to retain:

- Ron needs to develop more of a leadership role within the LCC with twenty-three

years of experience with the Company, his role should be one of coaching or mentoring. This is not the perception within the department.

- Ron does not stretch beyond his day-to-day duties. Tends to operate in his own silo of responsibility, unless asked. Needs to develop a sense of team to actively seek out those areas he can assist others in.

- Ron has to develop more of a mentoring role and actively dispense his years of knowledge and experience to others. Does not take the initiative to foster and teach new employees. Complaints are that new hires have to 'pull' knowledge out.

- Ron's leadership has been lacking initiative and mentoring of new employees. He has not been the leader we had hoped for on new conversions.

7. Skelton Misrepresents the Timeline and After-Effects of the RIF

Skelton's Petition relies upon distortions and fabrications of evidence in an effort to suggest that the Sixth Circuit did not properly consider the evidence at hand. Some of Skelton's efforts in this regard are absurd.

For example, Skelton asserts that Sara Lee determined which Planners would be retained prior to the interviews conducted by Humphrey and Rogers.

Skelton does not attempt to support this assertion with any evidence, because there is none. Skelton's premise that Sara Lee had determined which Planners would be eliminated prior to the interviews and meetings is simply false.

Skelton also falsely asserts that (i) he was willing to relocate, and (ii) Sara Lee ignored his attempts to find comparable employment. No evidence suggests that Skelton indicated he was willing to relocate. Rather, there is only evidence to the contrary, because he never showed an interest in any of the Planner positions available at the mixing centers.

As to whether these positions were posted, Skelton testified that he did not recall if they were posted but that he never asked anyone about them. However, Mehta testified unequivocally, and provided documentary evidence, that they were indeed posted. Specifically, Mehta testified that all open positions within Sara Lee are posted on an internal company website. Indeed, the record contained specific postings for positions for Allentown, Pennsylvania; Rochelle, Illinois; and Arizona which were posted on Sara Lee's internal website after Skelton had been notified that he would be terminated, but while he was still working at Spring Grove. Skelton neither applied for, nor expressed interest in them.

Skelton also asserts that Sara Lee provided assistance to younger Planners in finding alternate employment with Sara Lee but provided no assistance to him. Skelton claims in his Petition that he searched "daily" on the Sara Lee website for opportunities "at Spring Grove." However, it is undisputed that Skelton

never applied for any of the Planner positions Sara Lee posted, or any positions whatsoever, anywhere. On the other hand, Joe Sharp (age 52), another Planner who lost his job in the RIF, applied for a Track and Trace Associate position that was posted on Sara Lee's website and was hired into that job. Thus, the distinction between Sharp on the one hand, and Skelton on the other, is not one of age, but rather one of actually demonstrating interest in a position.

REASONS FOR DENYING THE PETITION

A. Skelton's Conclusion That the Sixth Circuit's Decision Below Implicates the Seventh Amendment is Based on a Misinterpretation of the Standard Set Forth in *Reeves* and a Mischaracterization of the Sixth Circuit's Decision.

Skelton asks this Court to grant certiorari to clarify that, in cases where discrimination plaintiffs have produced evidence of a *prima facie* case and pretext, a jury question is created, which is protected by the Seventh Amendment. In support of his request, Skelton relies on this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.* 530 U.S. 133 (2000). According to Skelton, the Sixth Circuit below in *Skelton*[1] ignored the authority in *Reeves* prohibiting the court from weighing evidence in favor of the employer, applied a pretext plus standard in affirming summary judgment,[2] and usurped

1. *Skelton v Sara Lee Corp.*, No. 06-4234, 2007 U.S. App. LEXIS 23521 (6th Cir. Oct. 3, 2007), attached to Skelton's Petition at A1-A46.

2. Nowhere on the cited pages of the Sixth Circuit's opinion does the court ever make any reference at all to "pretext plus."

the role of the jury as factfinder in violation of Skelton's Seventh Amendment right to a jury trial.

1. ***Reeves* does not provide that a jury question is necessarily created whenever a plaintiff establishes a prima facie case and comes forth with any evidence of pretext. A plaintiff's pretext evidence must be sufficient to discredit the employer's explanations for its action.**

In his Petition, Skelton argues that *Reeves* stands for the proposition that a plaintiff survives summary judgment when he establishes a *prima facie* case and evidence that creates a genuine issue of material fact as to pretext. Skelton fails to appropriately interpret this Court's holding in *Reeves*.

In *Reeves*, this Court held that "a plaintiff's prima facie case, combined with *sufficient* evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated." 530 U.S. at 148 (emphasis added). The *Reeves* Court further explained:

> Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created

> only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id. The Court went on to say that "[w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors." *Id.* Such factors include: "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id.* at 148-149. The *Reeves* Court concluded by stating, "we need not – and could not – resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law." *Id.* at 149. Nevertheless, the *Reeves* Court made it abundantly clear that there are a myriad of circumstances in which a plaintiff may establish a *prima facie* case and set forth weak evidence of pretext, and the employer would still be entitled to judgment as a matter of law.

2. The Sixth Circuit determined that Skelton's pretext evidence was insufficient, consistent with this Court's holding in *Reeves*.

The Sixth Circuit held that Skelton "failed to present sufficient evidence that [Sara Lee's] asserted justification demonstrates pretext, or that it lacks credibility." (Petition Appendix at A-40) (citing *Reeves*, 530 U.S. at 149). Notwithstanding this proper conclusion, Skelton argues that the Sixth Circuit improperly weighed evidence on the question of pretext.

Skelton bases his entire argument in this regard on an allegation that the Sixth Circuit

> weighed evidence in favor of the movant when it accepted, as true, testimony from the movant's witnesses that it selected Skelton for termination because of an alleged unwillingness to work longer hours and disregarded his evidence that it had been unnecessary for him to work these longer hours because of his efficiency in completing his work.

This claim both distorts the Sixth Circuit's review of the evidence on this issue, and ignores the totality of the Sixth Circuit's analysis.

First, the Sixth Circuit followed guiding law in recognizing that Skelton could prove pretext by showing that Sara Lee's proffered reason (1) had no basis in fact, (2) did not actually motivate Sara Lee's actions, or (3) was insufficient to motivate Sara Lee's actions. *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 576 (6th Cir. 2003). The Sixth Circuit engaged in a detailed analysis of the evidence presented with regard to each and every one of these three avenues. Skelton's challenge of the Court's analysis, however, is based exclusively on the claim that the Sixth Circuit ignored his evidence that he was simply so efficient in his work that it had never been necessary for him to work longer hours.

This "evidence" was evaluated in connection with the Court's analysis of the third method of demonstrating pretext: by showing that the articulated reason is

insufficient to motivate the challenged conduct. Contrary to Skelton's contention, the Court did not dismiss or disregard his evidence. Rather, it correctly determined that Skelton's evidence did not establish that Sara Lee's proffered reason for his termination was a pretext for age discrimination. Indeed, Skelton did not offer any evidence to discredit the testimony of numerous witnesses, who testified that their perception was that Skelton did only what was necessary, and nothing more. Although he personally may have had a different opinion of his own work ethic and willingness, that was not the perception of others, and he offered no evidence to refute that critical fact. More importantly, and as the Sixth Circuit noted, he did not assert that any of the Planners who were retained "exhibited an unwillingness to 'put in as much time and effort as necessary, and go beyond the traditional job requirements in order to meet the needs of the business.'"

In short, the Sixth Circuit properly determined – in accordance with *Reeves* – that Skelton had not presented evidence to rebut Sara Lee's articulated reason for his termination and, therefore, could not establish pretext.

B. There Is No Split Among the Circuits Regarding the Probative Value of Evidence of an Employer's Flawed or Subjective Process for Conducting a RIF.

Skelton argues that in analyzing the sufficiency of pretext evidence in RIF cases, the Circuits are split regarding whether evidence of a flawed, inconsistent, or subjective RIF process is probative of or sufficient to establish a genuine issue as to whether an employer's articulated reasons are pretext for unlawful

discrimination. In support of his argument, Skelton points to cases in the Tenth, D.C., and First Circuits, which he claims hold that evidence that a plaintiff's termination is not in accord with the RIF criteria supposedly employed, and evidence of subjective criteria used by employers in making termination decisions, can demonstrate pretext. He further claims that cases from the Seventh, Ninth, and Eleventh Circuits are allegedly inconsistent with that position. Skelton asserts that the cases from these Circuits all reject the premise that evidence of a subjective or flawed RIF process is sufficient to, or even probative of, pretext. These cases, however, do not stand for this proposition.

In his Petition, Skelton discusses three Seventh Circuit cases that allegedly hold that a court cannot sit as a super-personnel department by second-guessing the judgment of an employer in conducting its RIF process, and that an employer's hiring or promotion decision based purely on subjective criteria will rarely prove pretext. (*See* Petition, pp. 29-30) (discussing *Cowan v. Glenbrook Security Servs., Inc.*, 123 F.3d 438, 445-446 (7th Cir. 1997), *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997), and *Millbrook v. IBP, Inc.*, 280 F.3d 1169 (7th Cir. 2002)). None of these cases, however, involve an employment decision allegedly resulting from a reduction in force. Even more critically, none of them discuss, even generally, whether an employer's flawed, subjective, or inconsistent criteria can establish pretext in the context of a RIF. Accordingly, these cases do not present a conflict to the authority in the other Circuits.

The Ninth and Eleventh Circuit cases discussed in Skelton's Petition do involve reductions in force, but do *not* reject the premise that a subjective or flawed RIF process can be probative of pretext. What they hold is that evidence of a subjective or flawed RIF process is not sufficient, *standing alone*, to establish pretext. This is very different from Skelton's characterization of these cases.

In *Coleman v. The Quaker Oats Co.*, 232 F.3d 1271, 1285 (9th Cir. 2000), the Ninth Circuit case cited by Skelton, the plaintiff attacked the rating system used by the defendant as subjective, and claimed that it was a cover for age discrimination. The *Coleman* court held that "[w]hile a subjective evaluation system can be used as cover for illegal discrimination, subjective evaluations are not unlawful per se and 'their relevance to proof of a discriminatory intent is weak.'" *Id.* Interestingly, this holding, is strikingly similar to the holding of the case Skelton cites from the Tenth Circuit as being on the other side of the alleged split of Circuits. *See* Petition, p. 25; *Bauer v. Bailer*, 647 F.2d 1037, 1046 (10th Cir. 1981) (stating that "[s]ubjective considerations are not unlawful per se" and "[o]bviously subjective decision making provides an opportunity for unlawful discrimination"). Moreover, this same Tenth Circuit case quotes case law from this Court that an "'employer has discretion to choose among equally qualified candidates, provided that the decision is not based upon unlawful criteria.'" *Bauer*, 647 F.2d at 1046 (quoting *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981)).

The plaintiff in *Coleman* criticized the defendant's rating system, claiming it did not do a good job of

evaluating the employees. 232 F.3d at 1285. The plaintiff alleged that other methods, such as standardized testing, would have been a better tool. *Id.* The court found that this allegation did little to help the plaintiff establish that the defendant used a subjective system in order to discriminate against older employees. *Id.* Accordingly, the Ninth Circuit acknowledged that while a subjective system may be *some* evidence of pretext for discrimination, it is not sufficient evidence of pretext when standing alone.

Similarly, in *Chapman v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000), the Eleventh Circuit case cited by Skelton, the court did not hold that subjective criteria used in a RIF could not be probative of pretext. Again, the Court's holding was that subjective criteria, standing alone, was not sufficient evidence in that case for the factfinder to conclude that the defendant's proffered reason for the plaintiff's discharge was a pretext for discrimination. The court noted that "[n]one of the evidence [the plaintiff] offered rebutted [the defendant's] articulated nondiscriminatory reason." *Id.* at 1031. This case, therefore, does not present a "conflict" with the professed authority in the Tenth, D.C., and First Circuits cited by Skelton.

Skelton's Petition also alleges that the Sixth Circuit has approached the question of flawed or subjective RIF processes in several conflicting ways. In support of this position, Skelton cites the Sixth Circuit's *Skelton* decision, where the court allegedly dismissed a factual dispute regarding whether Sara Lee followed its own criteria in implementing its RIF as not probative of pretext. As discussed above, the *Skelton* decision is

wholly consistent with *Reeves*. The *Skelton* court reviewed the record taken as a whole and drew all reasonable inferences in favor of Skelton. *See Reeves*, 530 U.S. at 150. None of Skelton's evidence, though, was sufficient to find that Sara Lee's asserted reason for Skelton's termination was false. *Id.* at 148. The *Skelton* court did not dismiss Skelton's factual dispute. The court stated that "although there may be *some* evidence to show that [Sara Lee] did not rely solely on the criteria that it proffers, Skelton simply has produced no evidence that [Sara Lee] utilized any alternate criteria that implicated intentional age discrimination." (Petition Appendix at A-41-A-42).

Skelton also cites *Blair v. Henry Filters, Inc.*, 505 F.3d 517 (6th Cir. 2007) in support of his position. *Blair*, however, is not relevant to this dispute. *Blair* concerned an employer's complete lack of an objective plan for its reduction in force. This was not at issue below or in any of the allegedly conflicting cases in the various Circuits. Accordingly, *Blair* is immaterial to this Court's consideration of Skelton's Petition.

Contrary to Skelton's characterization, there is no split of authority which requires resolution, nor did the Sixth Circuit improperly evaluate the pretext issue.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

DEBORAH S. BRENNEMAN
Counsel of Record
LETITIA S. BRYANT
THOMPSON HINE LLP
312 Walnut Street, Suite 1400
Cincinnati, Ohio 45202-4089
(513) 352-6540
debbie.brenneman@thompsonhine.com
letitia.bryant@thompsonhine.com

Counsel for Respondent